ATTORNEY FOR APPELLANT:

MATHEW JON MCGOVERN
Evansville, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

RICHARD C. WEBSTER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ADAM MILEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 82A01-0510-CR-464
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Wayne Trockman, Judge
Cause No. 82D01-0502-FB-122

August 24, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Adam Miley appeals the fourteen-year aggregate sentence that was imposed following his guilty plea to Count I, Causing Death when Operating a Motor Vehicle with a BAC of .15 or More,[1] a class B felony, and Count II, Causing Death When Operating a Motor Vehicle with a Schedule I or II controlled substance in the Blood,[2] a class B felony. Specifically, Miley claims that the trial court improperly found the existence of three aggravating circumstances and failed to identify his decision to plead guilty, his show of remorse, and his acceptance of responsibility for his actions as significant mitigating factors. Miley also contends that the sentence was inappropriate in light of the nature of the offense and his character.

Concluding that only one of Miley's convictions may stand in light of double jeopardy concerns, we are compelled to vacate the conviction and sentence under Count II. Moreover, we find that only one of the identified aggravating circumstance was proper, and conclude that the trial court erred in not considering Miley's decision to plead guilty and his remorse as significant mitigating factors. Thus, we also vacate the fourteen-year sentence that was imposed on Count I and remand this cause to the trial court with additional instructions that it modify the sentencing order to reflect a sentence of twelve years on Count I.[3]

---

[1] Ind. Code § 9-30-5-5(b)(1).

[2] I.C. § 9-30-5-5(b)(2).

[3] We have the power to review and revise sentences under Article VII, Section 6 of the Indiana Constitution.

FACTS

On February 10, 2005, Miley and Farris met in Evansville so Miley could help move Farris's truck that was stuck in some mud. Prior to meeting Farris, Miley purchased a six-pack of beer and drank four of them between 3:00 p.m. and 4:00 p.m. Thereafter, the two moved Farris's truck, and drove to a bar in Chandler. While at the tavern, Miley and Farris drank approximately five buckets of beer. Each bucket contained five bottles of beer.

Thereafter, Farris and Miley drove to the "She Lounge." Tr. p. 7. Before entering the bar, Farris asked Miley if he wanted to smoke some "opium." Tr. p. 7-8. Miley agreed, and took approximately three or four "hits" of a red powdery substance from a pipe. Tr. p. 7-8. However, Miley could not discern whether this substance had any effect on him because he was already intoxicated.

While at the She Lounge, Farris and Miley drank four to six pitchers of beer. At approximately 10:15 p.m., the two left the bar, and, while driving Farris home, Miley sped through a red light and struck another vehicle. As a result, Michael Barnett, the driver of the other vehicle, was killed. After the police arrived, Miley was transported to the hospital where it was determined that his blood alcohol content (BAC) was .18. The test administered to Miley also revealed that there were traces of amphetamine and marijuana in his blood.

As a result of this incident, Miley was charged with the above two offenses, as well as: Count III, Operating a Vehicle with a BAC of .15 or More,[4] a class D felony; Count IV,

[4] I.C. § 9-30-5-1(B).

Operating a Vehicle while Intoxicated,[5] a class D felony; and Count V, Operating a Vehicle with a Schedule I or II Controlled Substance or its Metabolite in the Body,[6] a class D felony.

Thereafter, Miley sought to plead guilty to all charges, and the trial court ultimately accepted the plea after determining that Miley was waiving all applicable rights and that he understood the nature of the charges against him. The trial court also advised Miley of the sentencing possibilities for the crimes and determined that Miley was knowingly and voluntarily pleading guilty.

At the sentencing hearing conducted on September 8, 2005, the trial court identified the following aggravating circumstances: (1) Miley's prior criminal history which consisted of "two prior gun charge" convictions, and convictions for conversion and theft. The trial court also noted that Miley had a juvenile adjudication for burglary, and a prior conviction for driving while intoxicated, tr. p. 33; (2) that Miley was under the influence of alcohol, amphetamines, cannabis, and opium when he committed the instant offenses; (3) that the victim, Michael Barnett, was a valued member of his family and the community; and (4) that the citizens of the community have the right to be safe on the streets and free from intoxicated drivers. The trial court also stated that the community will not tolerate those who drink or use drugs and drive. No mitigating factors were identified.

Following Miley's guilty plea, the trial court merged Counts III and IV with Count I, and Count V with Count II. In the end, Miley was sentenced to an executed term of fourteen

---

[5] I.C. § 9-30-5-2(A).

[6] I.C. § 9-30-5-1(C).

years on each of the two counts. The trial court ordered the sentences to run concurrently. Miley now appeals.

DISCUSSION AND DECISION

I. Double Jeopardy Concerns

While Miley does not argue that double jeopardy prohibitions preclude a conviction and sentence on both counts, we sua sponte address this issue. See Haggard v. State, 445 N.E.2d 969, 971 (Ind. 1983) (holding that double jeopardy violations are fundamental error and are to be addressed sua sponte by the appellate court).

At the outset, we note that the statute under which Miley was charged, Indiana Code section 9-30-5-5(b), provides as follows:

> (b) A person at least twenty-one (21) years of age who causes the death of another person when operating a motor vehicle:
>
> (1) with an alcohol concentration equivalent to at least fifteen-hundredths (0.15) gram of alcohol per:
>
> (A) one hundred (100) milliliters of the person's blood; or
>
> (B) two hundred ten (210) liters of the person's breath; or
>
> (2) with a controlled substance listed in schedule I or II of IC 35-48-4 or its metabolite in the person's blood;
>
> commits a Class B felony.
>
> (c) A person who violates subsection . . . (b) commits a separate offense for each person whose death is caused by the violation of subsection . . . (b).

Prior to 1994, the relevant statutes (then I.C. §§ 9-11-2-1, 9-11-2-2 and 9-11-2-5) focused upon the act of operating a motor vehicle in an impaired condition rather than upon the results of that conduct, i.e. bodily injury or death. During the time frame in which the former statutes were in effect, several decisions from this court stated in effect that "[t]he

number of victims does not increase the number of crimes." Dupin v. State, 524 N.E.2d 329, 332 (Ind. Ct. App. 1988) (Sullivan J., concurring); see also Hurst v. State, 464 N.E.2d 19, 21-22 (Ind. Ct. App. 1984). This focus, of course, was dependent upon how the particular crime was defined and how the elements of the crime were set forth in the statute.[7]

Be that as it may, with regard to vehicle operation offenses while intoxicated either by alcohol in the blood or by a controlled substance or substances, the 1994 legislative amendment of Indiana Code section 9-30-5-5 changed the statutory focus from the act of driving while intoxicated to the act of causing the death of another. More specifically, the 1994 amendment stated that a person violating the statute "commits a separate offense for each person whose death is caused . . . ." Hence, the law was changed in order to permit multiple convictions for multiple victims.

In this case, there is only one victim. In our view, it is improper to extend the legislature's provision for multiple convictions, which are expressly intended to reflect multiple victims, to multiple intoxicants as well. Had Miley killed more than one person, most certainly he could be convicted separately for each victim. However, it does not follow that the fact of killing one person is affected by the perpetrator's degree of intoxication or the number or classification of the particular intoxicants leading to the defendant's impaired condition. To be sure, such a conclusion is supported by Duncan v. State, 274 Ind. 457, 412

[7] Examples of situations in which multiple victims permissibly resulted in multiple convictions are represented by Johnson v. State, 455 N.E.2d 932, 937 (Ind. 1983), in which two separate and distinct acts were directed at two separate and distinct victims, and Randall v. State, 455 N.E.2d 916, 931-32 (Ind. 1983), in which five separate confinements took place because there was a "personal crime" as to each of the five victims.

N.E.2d 770 (Ind. 1980). In Duncan, our Supreme Court addressed the issue of whether a defendant could be convicted of seven violations of the same statute, Indiana Code section 35-24.1-4.1-2,[8] for dealing seven different controlled substances in two separate transactions. It was ultimately determined that the defendant could only be convicted twice—not seven times—for the two separate drug transactions he was involved in, regardless of the fact that seven different substances were involved. In reaching its conclusion the Duncan court observed:

> It is our opinion, therefore, that a single sales transaction between the same principals at the same time and place which violates a single statutory provision does not justify conviction of a sentence for separate crimes even though more than one controlled substance is involved.

Duncan, 274 Ind. at 464, 412 N.E.2d at 775-76. Furthermore, it was noted that the statute at issue was entitled "Unlawful dealing in a controlled schedule I, II, or III substance," and did not "specifically state that the penalties [were] intended to be additive when different substances [were] involved in a single transaction." Id.

In our view, the same reasoning applies here. In particular, the statute under which

---

[8] Indiana Code § 35-24.1-4.1-2 stated the following in pertinent part:

> "(a) Except as authorized by this article . . ., a person is guilty of unlawful dealing in a schedule I, II or III controlled substance if he:
>
> (1) knowingly manufactures or delivers a controlled substance, pure or adulterated, classified in schedule I, II or III, except marijuana or hashish; or
>
> (2) possesses with intent to manufacture or deliver a controlled substance, pure or adulterated, classified in schedule I, II or III, except marijuana or hashish."

While this statute is arguably distinguishable from Indiana Code section 9-30-5-5 because it provides for multiple controlled substances in the same subsection, in significant part it treats multiple substances in the

Miley was convicted, Indiana Code section 9-30-5-5, addresses what appears to be the single violation of causing death, as is indicated by its title, "Classification of offense; death." Further, the statute specifically indicates the circumstances under which penalties are intended to be additive (multiple deaths under subsection (c)), and such circumstances do not include using more than one of the enumerated substances. Given the facts that Miley was involved in one vehicle car crash "transaction," that such "transaction" involved one victim and occurred at one time and place, and that this "transaction" violated a single statutory provision, under the reasoning in Duncan, Miley may not be convicted twice under Indiana Code section 9-30-5-5 for causing one death, in spite of the fact that he was under the influence of more than one substance. Indeed, if a defendant's convictions under a statute aimed at criminalizing drug dealing may not be multiplied to reflect the various drugs he deals, it seems even less likely that a defendant's conviction under a statute criminalizing the entirely separate topic of causing death by a motor vehicle could reflect the number of drugs involved.

Finally, we note that in the recent case of Mathews v. State, No. 49S02-0509-PC-405 (Ind. June 28, 2006), our Supreme Court interpreted the Indiana arson statute to provide that "damaging one property by fire is only one arson, even if the fire produces multiple consequences, any one of which is sufficient to constitute arson." Slip op. at 1. In arriving at this conclusion, the Mathews court reasoned that the arson statute criminalized the act of

---

disjunctive, just as section 9-30-5-5 does. In light of the statutes' similar treatment of multiple controlled substances in the disjunctive, any difference in their format does not appear to be material.

damaging property, not injuring people, and that "the structure of the arson statute dictates that damaging property owned by only one owner by the same use of fire, explosive, or destructive device is only one B felony arson, whether it falls under one or more than one of the alternatives in section 1(a)." Id. at 9-10. Under a similar statutory construction, Indiana Code section 9-30-5-5(b) dictates that causing the death of a person while operating a motor vehicle is a single Class B felony, whether it falls under one or more than one of the intoxication alternatives in section 5(b). Therefore, we must conclude that Miley's conviction and sentence for causing death when operating a motor vehicle with a Schedule I or II controlled substance in the blood as charged under count II cannot stand.

II. Aggravating Factors

Proceeding to the issues that Miley presents in this appeal, he first contends that his sentence must be set aside and that the "presumptive" term[9] of ten years should be imposed on remand because several aggravating circumstances found by the trial court were improper. Specifically, Miley argues that the trial court improperly identified the following as aggravating circumstances: (1) the crimes were committed while Miley was intoxicated with alcohol, amphetamine, and cannabis in his blood; (2) that the victim was a valued member of his family and of the community as a whole; and (3) that citizens have the right to be safe on the streets, free from intoxicated drivers.

---

[9] Indiana's sentencing statutes were amended by P.L. 71-2005, sec. 7, with an emergency effective date of April 25, 2005, to alter "presumptive" sentences to "advisory" sentences. In accordance with Indiana Code section 35-50-2-5, "A person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years." Although Miley frames his

We note that sentencing decisions are within the sound discretion of the trial court. Jones v. State, 790 N.E.2d 536, 539 (Ind. Ct. App. 2003). And those decisions are given great deference on appeal and will only be reversed for an abuse of discretion. Beck v. State, 790 N.E.2d 520, 522 (Ind. Ct. App. 2003). When the trial court imposes a sentence other than the advisory sentence, we will examine the record to insure that the trial court explained its reasons for selecting the sentence it imposed. Kelly v. State, 719 N.E.2d 391, 395 (Ind. 1999). The trial court's statement of reasons must include the following components: (1) identification of all significant aggravating and mitigating circumstances; (2) the specific facts and reasons that led the court to find the existence of each such circumstance; and (3) an articulation demonstrating that the mitigating and aggravating circumstances were evaluated and balanced in determining the sentence. Id.

We also note that a single aggravating factor may be sufficient to support an enhanced sentence. Powell v. State, 769 N.E.2d 1128, 1135 (Ind. 2002). And a defendant's criminal history alone may be a sufficient basis for imposing an enhanced sentence when considering the gravity, nature, and number of prior offenses as they relate to the current offense. Morgan v. State, 829 N.E.2d 12, 15 (Ind. 2005).

In addressing Miley's claims, this court has held that a fact that comprises a material element of the offense may not constitute an aggravating circumstance that would justify an enhanced sentence. Asher v. State, 790 N.E.2d 567, 570 (Ind. Ct. App. 2003). However, the trial court may properly consider the particularized circumstances of the material elements of

---

argument based on the "presumptive" term, because his sentencing hearing took place after April 25, 2005,

the crime as a separate aggravating circumstance. Scott v. State, 840 N.E.2d 376, 382 (Ind. Ct. App. 2006).

As noted above, we have vacated Miley's conviction and sentence under Count II as a result of double jeopardy prohibitions. Thus, we turn to the factors that the trial court considered in sentencing Miley under Count I. We initially observe that to obtain a conviction for this offense, the State was required to show beyond a reasonable doubt that (1) Miley, who was at least twenty-one years old; (2) caused the death of Michael Barnett while driving a motor vehicle; (3) with an alcohol concentration equivalent to at least .15 gram of alcohol per: (A) 100 milliliters of the person's blood; or (B) 210 liters of the person's breath. I.C. § 9-30-5-5(b)(1).

At the sentencing hearing, the trial court merely noted the existence of the alcohol as the basis for the aggravator. Tr. p. 33. Inasmuch as Miley's intoxication is a material element of the offense, we must conclude that the trial court's identification of Miley's intoxication as an aggravating circumstance was improper.

As for Miley's claim that the trial court improperly determined that the victim's valuable and upstanding life should also be considered an aggravating circumstance, our Supreme Court has determined that such "impact evidence" can only be used as an aggravator if the defendant's actions had a destructive impact on others not normally associated with the commission of the subject offense and that this destructive impact was foreseeable to the defendant. Pickens v. State, 767 N.E.2d 530, 535 (Ind. 2002). Here, the

---

the correct terminology to use is "advisory sentence."

trial court acknowledged that Barnett was a good husband and father and an individual who was devoted to his family and community. Id. at 34. In our view, such circumstances noted by the trial court involving this tragic loss are those that are typically encompassed within the range of impact evidence "that the presumptive sentence is designed to punish." Pickens, 767 N.E.2d at 535. In other words, the trial court did not explain or outline how Miley's actions had such a destructive impact on others that is not normally associated with causing the death of another person. Hence, we must conclude that the trial court's identification of this factor as an aggravating circumstance was improper.

Finally, we address Miley's claim that the trial court improperly found as an aggravator: "that every person in this community . . . has the right to be safe on our streets from intoxicated drivers, [and] the community will not tolerate those who drink and drive." Tr. p. 34-35. In our view, it is apparent that Miley's sentence was aggravated—at least in part—in order to send a personal, philosophical, or political message to the community. Such a statement is improper to warrant the aggravation of a defendant's sentence. Beno v. State, 581 N.E.2d 922, 924 (Ind. 1991).

In sum, the trial court properly identified Miley's criminal history as a significant aggravating factor. On the other hand, the three remaining aggravating circumstances found by the trial court were improper.

III. Mitigating Factors

Miley also contends that his sentence cannot stand because the trial court overlooked a significant mitigating circumstance that was apparent from the record. Specifically, Miley

argues that the trial court erred in failing to identify Miley's willingness to accept responsibility for his actions and his decision to plead guilty as mitigating circumstances.

In resolving this issue, we note that the determination of both the existence of, and the weight to be given to, mitigating factors falls within the trial court's discretion. Allen v. State, 722 N.E.2d 1246, 1251 (Ind. Ct. App. 2000). A trial court is not required to give the same weight to mitigating evidence as does the defendant, nor must the court accept the defendant's assertions as to what constitutes a mitigating circumstance. Id. at 1252. By the same token, a defendant's guilty plea should be considered as a mitigating circumstance if the State reaps a benefit from the plea. Cloum v. State, 779 N.E.2d 84, 89 (Ind. Ct. App. 2003). The State will be said to have reaped a benefit from the defendant's plea when, for example, the plea conserves judicial resources and spares the victims the emotional trauma of a trial. Id. When the trial court ignores the defendant's willingness to plead guilty and bestow upon the State such benefits, this court will find that the trial court erred in not finding the defendant's willingness to plead guilty as a mitigating circumstance. Id.

In this case, we note that Miley did not receive any benefit as a result of his decision to plead guilty because he pleaded to all of the offenses that were charged without the benefit of any plea bargain offered by the State. Appellant's App. p. 8-9. Moreover, the State was saved the expense of a trial, and it obtained convictions against Miley except for the trial court's decision to merge several of the offenses. Additionally, Barnett's family was spared the emotional turmoil and trauma of a trial, and Miley displayed remorse for his actions.

In writings that were submitted to the trial court, Miley accepted complete

responsibility for his actions and for taking another person's life. Id. at 112. And Miley expressed similar sentiments in a letter that he sent to Barnett's family. Id. In our view, Miley's decision to plead guilty along with his remorse and acceptance of responsibility for his actions constitute significant mitigating factors that were overlooked by the trial court.

In light of the above, it is apparent that the record supports a finding of one valid and significant aggravating circumstance—Miley's criminal history. By the same token, the trial court overlooked the significant mitigating circumstances described above when it imposed the sentence. That said, while it has been determined that a defendant's criminal history alone may be a sufficient basis for imposing an enhanced sentence, other factors including the gravity, nature, and number of prior offenses as they relate to the current offense must also be considered. Morgan v. State, 829 N.E.2d 12,15 (Ind. 2005). As we have discussed, Miley had a prior conviction for driving while intoxicated, as well as other convictions involving firearms and offenses against property. Such prior convictions—in and of themselves—could certainly warrant an enhanced sentence above the advisory term. See id. at 16. However, when considering the mitigating factors that the trial court overlooked, we are not confident that the trial court would have sentenced Miley to a term of fourteen years on Count I, had the mitigating factors been recognized and balanced against the lone valid aggravating factor. As a result, we remand this case to the trial court with instructions that it vacate Miley's sentence and modify the sentencing order to reflect a sentence of twelve

years.[10] Also, as discussed above, the trial court is directed to vacate the conviction and sentence that was imposed on Count II.

The judgment of the trial court is affirmed in part, reversed in part, and remanded for a correction of the sentence.

SULLIVAN, J., and MAY, J., concur.

[10] In light of our decision to revise Miley's sentence, we need not address his argument under Indiana Rule of Appellate Procedure 7(B) that the fourteen-year aggregate sentence was inappropriate in light of the nature of the offense and his character.